

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition of Grande Communications Inc.)	
For Declaratory Ruling Regarding)	WC Docket No. 05-283
Intercarrier Compensation For)	
IP-Originated Calls)	

COMMENTS OF JOHN STAURULAKIS, INC.

John Staurulakis, Inc. (“JSI”) hereby responds to the invitation of the Federal Communications Commission (“FCC” or “Commission”) to comment on a petition for declaratory ruling filed by a local exchange carrier (“LEC”), Grande Communications Inc. (“Grande”).¹ Grande’s Petition seeks a ruling from the Commission that when the carrier receives traffic that has originated in Voice over Internet Protocol (“VoIP”) format, it may rely on a customer’s certification that the customer is exempt from access charges and that when such “Certificated Traffic” is forwarded to other local carriers for termination, the other carriers must likewise not assess access charges for such traffic.

JSI is a consulting firm offering regulatory, financial and business development services to more than two hundred rate-of-return LECs throughout the United States. Part of JSI’s consulting services consists of assisting these LECs with a variety of issues relating to interconnection and delivery of traffic to and from other providers. As the Commission has observed, rate-of-return carriers are “more dependent on their interstate access charge revenue

¹ See *Pleading Cycle Established for Grande Communications’ Petition for Declaratory Ruling Regarding Intercarrier Compensation For IP-Originated Calls*, WC Docket No. 05-283, Public Notice, DA 05-2680 (rel. Oct. 12, 2005) (“Public Notice”). The Public Notice seeks comment on Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-Certification of IP-Originated VoIP Traffic (filed Oct. 3, 2005) (“Petition”).

streams and universal service support than price cap carriers”² Accordingly, the determination of whether or not certain traffic is subject to access charges and whether this determination should be based on a certification made by another carrier and is a matter of critical importance to JSI clients and other rate-of-return LECs.³

I. Grande’s Assertion that the FCC Has Determined that VoIP Traffic is Exempt From Access Charges is False and Misleading

In its Petition, Grande bases its request for a declaratory ruling largely on the premise that the FCC has previously ruled that VoIP traffic is exempt from access charges. Grande takes great pains to explain the origin of the Commission’s decision to exempt enhanced service providers (“ESPs”) from access charges and asserts that the exemption “has been extended to IP-telephony services, except where the Commission has expressly found otherwise.”⁴ Grande then proclaims that “both in practice and under existing law and precedent, VoIP-originated traffic is exempt from access charges.”⁵ The primary support that it provides for these bold assertions is a

² See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order and Twenty-Second Order on Reconsideration, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244 at para 131 (2001).

³ As an initial matter, in its Petition, Grande does not explain or support its rejection of federally-sanctioned objective ways as to how to determine whether or not traffic is “local” or “interexchange” traffic. According to the Petition, the controversy that prompted the Petition is the application of access charges by other LECs on VoIP-originated calls that are considered “interexchange calls” based upon the “originating line information of the Certificated Traffic, such as CPN, and the fact that the traffic is terminated on the PSTN.” Petition at 9. Grande, however, apparently rejects this method and instead asserts that all VoIP-originated traffic is “local” and that it can route such traffic over local interconnection trunk groups based solely on the customers’ own assertions that the traffic has undergone a net protocol conversion and is thus enhanced or information services. *Id.* at 8-9.

⁴ Petition at i and ii.

⁵ *Id.* See Petition at 16 (“Because of the extremely narrow finding in the *AT&T VoIP Declaratory Ruling*, it does not abrogate the Commission’s fundamental position under current law of not regulating IP-enabled telephony applications and holding these services free from access charges”). See also “VoIP Terminations Supplement” attached to Petition in which Grande’s customers certify that they will deliver “enhanced traffic” as it is defined in 47 U.S.C. § 153(20). Although the VoIP Terminations Supplement implies that this statute refers to “VoIP Traffic,” the referenced statute instead defines “information service” and makes no reference to VoIP or IP-enabled technologies.

partial quote from the Commission’s initial Notice of Proposed Rulemaking in its intercarrier compensation proceeding.⁶ After recognizing that the question is still open as to whether VoIP traffic is properly classified as telecommunications or information services, Grande states, “In the interim, however, the Commission has stated that ‘IP telephony [is] generally exempt from access charges’”⁷

As demonstrated below, however, Grande omits certain key language from this quote and fails to place the quote in the context of the FCC’s more recent decisions. When considered in the proper context, it is clear that the assertion which underlies Grande’s Petition - that the FCC’s rules and precedent clearly exempts VoIP-originated traffic from access charges - is false and misleading. Accordingly, Grande’s Petition must be dismissed.

A. The Partial Quote is Misleading

When the quote from the ICC NPRM that is cited in Grande’s Petition is examined in its entirety, it is obvious that the Commission was not making a blanket declaratory statement that all VoIP-originated traffic is exempt from access charges as Grande’s Petition implies. On the contrary, the Commission was merely observing that when the ICC NPRM was released in 2001, long distance calls handled by ISPs using IP telephony are “generally exempt” from paying access charges under the ESP exemption. The partial quote was cited from the FCC’s initial notice seeking comment on developing a unified intercarrier compensation plan. In this ICC NPRM, the Commission recounted that two regimes comprise intercarrier compensation, namely access charge rules and reciprocal compensation rules. The Commission then noted exceptions

⁶ See *Developing an Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. Apr. 27, 2001) (“ICC NPRM”).

⁷ See Petition at 6 & 15 citing ICC NPRM at 9613 at para. 6.

to these rules, one being that “long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption.”⁸

B. A Review of More Recent FCC Decisions Reveals the Truth

Further, Grande omits the Commission’s more recent statements regarding whether VoIP providers are able to make use of the ESP exemption. In its comprehensive rulemaking on IP-Enabled Services that it initiated in 2004, the Commission sought comment on whether access charges should apply to several categories of various IP-enabled services including “phone-to-phone service using IP to transport interexchange traffic,” “services permitting IP telephony subscribers to communicate with subscribers of traditional circuit-switched telephone service” as well as a “broad range of IP platform services.”⁹ The Commission noted that by going through the exercise of seeking comment on whether access charges apply to these different categories, it was not addressing whether access charges do or do not apply to these categories and then stated,

As policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equally among those that use it in similar ways.¹⁰

The Commission reiterated this statement later on in the decision when it specifically sought comment on whether access charges should apply to VoIP services.¹¹ In this later context, the

⁸ ICC NPRM at para 6. In a footnote to this statement, the Commission defined “IP telephony” as “involv[ing] the provision of a telephony service or application using Internet Protocol” and stated, “IP telephony may be provided over the public Internet or over a private IP network.” *Id.* at note 5.

⁹ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at para. 32 (rel. Mar. 10, 2004) (“IP NPRM”).

¹⁰ *Id.* at para. 33 (emphasis supplied).

¹¹ *Id.* at para. 61.

Commission raised the issue as to whether identification of VoIP and IP-enabled service providers' traffic result in "significant incremental costs" if the Commission decided to not require these carriers to pay access or other compensation charges.¹²

In its decision in which it ruled that AT&T's "phone-to-phone" IP telephony service was not exempt from access charges, the Commission recognized that if it wanted to establish an exemption from access charge requirements for certain telecommunications services, "it would have been obligated to conduct a rulemaking in conformity with the Administrative Procedure Act."¹³ The Commission then cited statements made in its initial ICC NPRM and the IP NPRM regarding whether the ESP exemption applied to "phone-to-phone" IP telephony services and stated, "[s]tatements of policy in a Report to Congress or a Notice of Proposed Rulemaking – even if clear – cannot change our rules."¹⁴ In a footnote, the Commission remarked that the intent of such prior statements "remains a matter of significant dispute."¹⁵

Accordingly, when the entire quote cited by Grande is examined along with more recent Commission decisions on the matter, it is clear that the Commission has not made any rulings extending its ESP exemption to VoIP providers as so boldly asserted by Grande. On the contrary, the Commission's clearly articulated policies that require any service provider that sends traffic to the PSTN, including traffic that originates on an IP network, to be subject to access charges or similar compensation obligations and that the cost of the PSTN should be borne equally among those that use it in similar ways must continue to apply.

¹² Id. at para. 62.

¹³ See *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 at para. 16 (rel. Apr. 21, 2004) ("AT&T Order").

¹⁴ Id. citing IP NPRM at paras. 29-30 citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 at paras. 50, 52, 91 (1998); ICC NPRM at para. 133.

¹⁵ AT&T Order at n.67.

II. Grande's Declaratory Ruling Request is Too Limited for the Commission to Determine Whether VoIP Traffic is Exempt from Access Charges

Based upon the false assertion that the FCC's ESP exemption has been extended to VoIP providers, Grande makes its request that the Commission grant a declaratory ruling to permit Grande to rely upon a "local customer's certification" that the traffic being sent is VoIP-originated traffic and that it has undergone a net protocol conversion before being terminated on the PSTN provided that Grande has no reason to conclude otherwise.¹⁶ An "ancillary" ruling is also requested which would permit Grande to "properly sell such customers local services and that when Grande does so, the Certified Traffic carried over these local services is exempt from access charges."¹⁷ The purpose for making these requests is to "resolve the controversies whether Grande (or another entity) has an obligation to pay access charges for Certified Traffic or whether terminating LECs must treat Certified Traffic as local traffic unless and until the traffic is demonstrated to be something other than enhanced traffic."¹⁸

Although Grande's Petition rests on the assertion that "both in practice and under existing law and precedent, VoIP-originated traffic is exempt from access charges,"¹⁹ it is obvious that the real intent of its Petition is to have the Commission rule on whether all VoIP-originated traffic is exempt from access charges. If the Commission were to grant the requests, it would first have to examine the myriad of VoIP services some of which are cited in the IP NPRM such as phone-to-phone service using IP to transport interexchange traffic, services permitting IP telephony subscribers to communicate with subscribers of traditional circuit-switched telephone service and

¹⁶ Petition at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 5-6.

¹⁹ *Id.* at ii.

IP platform services and determine whether each category falls under the definition of enhanced and information services traffic. That determination, however, would not end the matter since the Commission has found that it can exercise its ancillary authority over Title I services and require VoIP providers to pay access charges or similar forms of compensation to ensure that the cost of the PSTN be borne equally among those that use it in similar ways.²⁰

At the very minimum these steps must be taken before allowing VoIP providers to certify that they are exempt from paying access charges. As the Commission's record reflects, "it is difficult to determine which calls utilize IP technology for the purpose of assessing access charges."²¹ Without specific rulings on these issues from the Commission, arbitrage would abound with many carriers utilizing IP technology certifying that they are exempt from paying access charges. The Commission has clearly stated that in its comprehensive IP NPRM, it will conduct "an analysis of the regulatory classification of a variety of IP services, including VoIP, and the applicability of access charges to those services."²² Accordingly, it would be a waste of limited Commission resources to examine these matters in the light of Grande's limited declaratory ruling.

III. Conclusion

As the Commission has long recognized, the cost of the PSTN must be borne equally among those that use it in similar ways. This is particularly critical for rate-of-return carriers that

²⁰ See IP NPRM at para. 61.

²¹ AT&T Order at para. 20 citing various commenters. See *Id.* at para. 2 ("There is significant evidence that similarly situated carriers may be interpreting our current rules differently"); Commissioner Abernathy's Statement attached to IP NPRM ("Providers have filed petitions for declaratory rulings because clarity is sorely needed: most notably, some interexchange carriers are paying access charges for terminating so-called phone-to-phone IP calls, whereas some are not. This disparity distorts competition as well as the flow of capital").

²² AT&T Order at para. 10.

rely heavily on access charges as a method of receiving compensation for use of their networks. In order to ensure that the continuation of this policy is considered in the promulgation of rules regarding VoIP services, the Commission has sought comment on whether access charges or other compensation charges should apply to VoIP traffic in the context of its IP-enabled services rulemaking proceeding and has raised other questions regarding compensation in light of the advent of new technologies in the context of its unified intercarrier compensation proceeding. Until such time as the Commission makes its rulings in these proceedings, the Commission should reject any attempts to circumvent the Commission's current policies and rules which apply whether the traffic originates on the PSTN, on an IP network or on a cable network. Accordingly, because Grande's Petition falsely asserts that the FCC has determined that VoIP traffic is exempt from access charges and seeks legitimacy for companies self-certifying that they are exempt, the Commission should reject Grande's Petition.

Respectfully submitted,

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John Staurulakis, Inc.

By: /s/ Manny Staurulakis_____

Manny Staurulakis
President
John Staurulakis, Inc.
7852 Walker Drive, Suite 200
Greenbelt, Maryland 20770
301-459-7590